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GOINS v. COMMONWEALTH 251 Va. 442, 470 S.E.2d 114 (1996) Supreme Court of Virginia

from Barnabei's ex-wife, Paula Barto. The notice alleged that, during the time Barnabei had been married to Barto, he had "engaged in a continuous course of threatening and assaultive conduct against [her], said conduct occurring on such a continuous and regular basis that [she could not] recall each and every specific date and occasion upon which such threatening and assaultive conduct occurred."[36]

However, during the penalty phase of the trial, Barto related one specific incident alleging that Barnabei had attempted to have anal intercourse with her, but she successfully had resisted the attempt. Barnabei objected and moved for a mistrial, asserting that the Commonwealth's notice had not adequately apprised him of the testimony. The trial court overruled the objection, and Barto further testified, over Barnabei's renewed objections, that Barnabei had forced her to have sexual intercourse with him on other particular occasions.[37] On appeal, Barnabei contended that the trial court erred in allowing Barto to testify about incidents that were not specifically alleged in the notice. The Supreme Court of Virginia disagreed. In so ruling, even the court could not bring itself to hold affirmatively that the notice given by the Commonwealth was "reasonable notice" that Barnabei would face testimony about specific incidents of forcible anal intercourse. Rather, it found that the allegations were "sufficient to allow the admission of her testimony."[38]

Defense counsel in Virginia should note that in so ruling, the Supreme Court of Virginia is inviting, if not requiring, a greater burden to be put on the trial judge. The court's holding in Barnabei requires defense counsel not only to move for early disclosure, but also to examine the response given by the Commonwealth and, when the response is as vague as it was in *Barnabei*, to make as many further motions as may be required to obtain clarification. Upon receipt of the Commonwealth's response, counsel may move *in limine* to limit the testimony to the scope of what was revealed in the response. If defense counsel does not file such further motions, and the defendant is later surprised in court, *Barnabei* makes clear that no relief will be granted on appeal. The responsibility for increased litigation and delay occasioned by litigating the questions of fair notice of unadjudicated acts rests with the Supreme Court of Virginia.

Summary and analysis by:
Lisa M. Jenio

36 *Barnabei*, 1996 WL 517733 at *10.
37 *Id.*
38 *Id.* at *11.

GOINS v. COMMONWEALTH

251 Va. 442, 470 S.E.2d 114 (1996)
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FACTS

On the morning of October 14, 1994, Christopher Goins and a friend visited the home of Goins's 14 year-old ex-girlfriend, Tamika Jones, who was then seven months pregnant with Goins's child. During the course of the visit Goins apparently became upset over the pregnancy. Tamika testified that she was in her bedroom when she heard Goins participating in a conversation which was interrupted by gunfire. She heard multiple gunshots and screams, then Goins appeared in her bedroom and shot her nine times. He also shot Tamika's 21-month-old sister, Kenya.[1]

After Goins left, Tamika called 911 and identified Goins to the operator as the shooter. When police arrived, they found that all of the members of the Jones family had been shot. Both parents and three children were dead. Only Tamika and Kenya survived. The forensic evidence showed that all of the victims had been shot multiple times with a .45 caliber Glock pistol.[2]

Two subsequent searches of the home of Goins's girlfriend, Monique Littlejohn, yielded an unfired .45 cartridge which matched those used in the killings and the instruction manual for a Glock pistol lying near some men's clothing.[3]

A jury found Goins guilty of the capital murder of one of the children based on the killing of more than one person in the same act or transaction.[4] He was also found guilty of four counts of first degree murder and two of malicious wounding, as well as seven counts of the use of a firearm in commission of a felony.[5]

At the penalty phase of the trial, the Commonwealth presented the testimony of a police detective who stated that eight months prior to the shootings he had arrested Goins for possession of crack cocaine. Goins did not appear for trial and was wanted on that charge at the time of the shootings. The state also presented the testimony of the medical examiner, who stated that several of the children may have been shot after they were unconscious or dead.[6]

In mitigation, the defense presented testimony that Goins's mother was an abusive drug addict, and that drug addiction and crime were prevalent in the Goins family. The jury also heard testimony that "Goins was devastated when his grandmother died, because she was the only person who had shown him any love."[7] The jury fixed the punishment for the capital murder conviction at death, based upon their finding both of the aggravating factors, future dangerousness and vileness.[8]

HOLDING

The Supreme Court of Virginia, after reviewing the record and disposing of multiple claims,[9] found that the sentence was not imposed

1 *Goins v. Commonwealth*, 251 Va. 442, 447-8, 470 S.E.2d 114, 119 (1996).
2 *Id.* at 448, 470 S.E.2d at 119.
3 *Id.* at 449-50, 470 S.E.2d at 120.
4 Va. Code Ann. § 18.2-31(7).
5 *Goins*, 251 Va. at 447, 470 S.E.2d at 118.
6 *Id.* at 451, 470 S.E.2d at 121.
7 *Id.* at 452, 470 S.E.2d at 122.
8 *Id.* at 447, 470 S.E.2d at 119.
9 The court made specific rulings on certain issues which will not be dealt with here at length:

1) the admissibility of photographs and videotapes is in the discretion of the trial court, and the fact that they are gruesome

under the influence of passion, prejudice or any other arbitrary factor. The sentence was not disproportionate to penalties imposed for similar crimes. The conviction and sentence were affirmed.[10]

ANALYSIS / APPLICATION IN VIRGINIA

I. Bill of Particulars

At trial Goins requested notice, through a bill of particulars, of the evidence upon which the Commonwealth would rely to prove the elements of capital murder and of the aggravating factors essential to his eligibility for a death sentence. The trial court denied the request. On appeal, Goins argued that the denial impeded his ability to make pretrial challenges to the constitutionality of the death penalty and capital murder statutes as applied in his case, and also impeded his ability to make motions for suppression of the evidence. Goins also argued that *Godfrey v. Georgia*[11] required the state to reveal its narrowing construction of the vileness factor if it intended to rely on that factor in the penalty phase.

The Supreme Court of Virginia upheld the trial court's denial of the motion on the ground that there is no right to a bill of particulars and the decision whether to require one is committed to the sound discretion of the trial court.[12] The court also held that the indictment gave the defendant sufficient notice of the nature and character of the offense.[13] Additionally, the Supreme Court of Virginia ruled that Goins had mischaracterized *Godfrey*, in that the rule in *Godfrey* was designed, not to give the defendant notice of the narrowing construction that would be used against him at the penalty trial, but rather to prevent juries from exercising unguided discretion. As interpreted by the Supreme Court of Virginia, *Godfrey* therefore applies solely to jury instructions, not motions for a bill of particulars.[14]

It appears that Goins's counsel argued quite properly that the motion for a bill of particulars should have been granted under Va. Code Ann. § 19.2-266.2. That section **requires** that any motion the defendant makes to dismiss the indictment or suppress evidence on the grounds of unconstitutionality be made **prior to trial.** In order to facilitate this, the statute requires that, "[t]o assist the defense in filing such motions or objections in a timely manner, the trial court **shall,** upon motion of the defendant, direct the Commonwealth to file a bill of particulars pursuant to § 19.2-230."[15] Thus, a common-sense reading of the statute would appear to have required that a bill of particulars should have been granted to Goins when he requested one to facilitate his pre-trial motions. The Supreme Court of Virginia, however, chose not to address the mandatory language of § 19.2-266.2 and instead relied solely upon the discretionary language of Va. Code Ann. § 19.2-230 to find that the granting or denial of the motion was strictly within the sound discretion of the trial judge.[16] Although in the typical case the Supreme Court of Virginia would be correct (at least as to statutory law) in its assertion that a "defendant is not entitled to a bill of particulars as a matter of right,"[17] under these circumstances the Virginia legislature has chosen to give just such a right to the defendant. Instead, in *Goins* the Supreme Court of Virginia did not rule on whether § 19.2-266.2 does or does not grant this right, but rather side-stepped the argument. Therefore, defense counsel may continue to argue at trial and on appeal that § 19.2-266.2 grants the defendant a statutory right to a bill of particulars, at least whenever additional information is necessary to support a motion to suppress evidence or a motion to dismiss the indictment on constitutional grounds.

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does not make them inadmissible, *Id.* at 459, 470 S.E.2d at 125-26; 2) a statement prompted by a startling event comes within the excited utterance exception of the hearsay rule, *Id.* at 460, 470 S.E.2d at 126; 3) prior threatening admissions by a party are admissible against him; *Id.* at 461, 470 S.E.2d at 127; 4) the court ruled on the admissibility of various types of documentary evidence, *Id.* at 461-63, 470 S.E.2d at 127-28; 5) the decision on whether to give a cautionary instruction for videotape evidence is within the trial court's discretion, *Id.* at 465, 470 S.E.2d at 129; 6) the evidence was sufficient to convict; *Id.* at 467, 470 S.E.2d at 130.

Goins also contended that the trial court erred in denying him the results of a polygraph test of a key government witness, and in not revealing certain documentary evidence. *Id.* at 455-56, 470 S.E.2d. at 123-24. Goins claimed he was due this information on multiple federal grounds: the due process, compulsory process, and confrontation clauses of the United States Constitution. Goins claimed the information was exculpatory under *Brady v. Maryland,* 373 U.S. 83 (1963). Although the Supreme Court of Virginia found no *Brady* violation because Goins could not prove that the undisclosed evidence was both exculpatory and material, counsel did an excellent job of preserving the issue for later federal appeal. In this case, raising of the *Brady* issues pre-trial also served the tactical purpose of forcing the Commonwealth to state on the record that it had no exculpatory evidence.

In addition, the court rejected many of the defendant's assignments of error in brief, conclusive language. Defense counsel is nevertheless to be commended for preserving these issues for later *habeas* review, particularly federal review. Issues in this category which will not be addressed in this summary include: (1) death penalty statutes fail to give jurors meaningful guidance that they may impose a death sentence only if they determine beyond a reasonable doubt that aggravating circumstances outweigh mitigating ones; (2) the death penalty statutes fail to instruct the jury properly as to mitigating evidence; (3) the aggravating factors of "vileness" and "future dangerousness" are unconstitutionally vague; (4) future dangerousness may not be proved by unadjudicated conduct unless the conduct is established beyond a reasonable doubt; (5) the death penalty as administered constitutes cruel and unusual punishment and is imposed in an arbitrary and discriminatory manner; (6) the death penalty statutes are unconstitutional because they do not require the setting aside of the sentence for good cause and permit the court to consider hearsay in the post-sentence report; (7) Virginia appellate review procedures are unconstitutional; (8) denial of *voir dire* and jury instructions to the effect that defendant would be required to serve a 25 year minimum without parole; (9) denial of additional peremptory challenges; (10) denial of individual *voir dire*; (11) denial of a request to mail a questionnaire to all potential jurors. *Id.* at 452-54, 470 S.E.2d at 121-23.

[10] *Id.* at 469, 470 S.E.2d at 131-32.

[11] 446 U.S. 420 (1980).

[12] *Goins,* 251 Va. at 454, 470 S.E.2d at 123 (citing *Quesinberry v. Commonwealth,* 241 Va. 364, 372, 402 S.E.2d 218, 223 (1991)).

[13] *Id.*

[14] *Id.* at 455, 470 S.E.2d at 123.

[15] Va. Code Ann. § 19.2-266.2 (emphasis added).

[16] Va. Code Ann. § 19.2-230 provides that the trial court "**may** direct the filing of a bill of particulars" (emphasis added).

[17] *Goins,* 251 Va. at 454, 470 S.E.2d at 123.

In capital cases, there exists a compelling federal constitutional basis for entitlement to a bill of particulars or its equivalent. The United States Supreme Court has held that due process requires that a defendant must be given notice of the nature and character of the offense sufficient to allow him to defend himself against the state's case for death.[18] In *Goins*, the Supreme Court of Virginia held that the indictment was sufficient to give such notice, without the need for a bill of particulars. An indictment will give notice of the elements of the offense of capital murder. It will provide no notice of the aggravating factors upon which the state will rely to procure a death sentence. Because at least one of these aggravating factors must be proved beyond a reasonable doubt before the jury can even consider imposing the death penalty,[19] the factors are essentially elements of the crime.

In Goins's case, however, not only did the indictment not give notice of the aggravating factor, it did not even give notice of the elements of capital murder. Goins was indicted under Va. Code Ann. § 18.2-31(7), which defines capital murder as the "killing of more than one person as a part of the same act or transaction."[20] Goins's capital murder indictment alleged that he murdered one of the children, Robert Jones, "in a . . . killing of more than one person as part of the same act or transaction."[21] The Supreme Court of Virginia has previously held that "[t]he critical issue is how many acts or transactions were involved,"[22] not how many victims there were. The indictment was arguably defective in that it failed to name which of the other victims was alleged to have been killed in the same act or transaction as was Robert Jones. Without this information, the inadequate indictment prevented Goins from even having notice of the Commonwealth's allegation of capital murder, let alone successfully contesting it.

Finally, the Supreme Court of Virginia, in ruling that *Godfrey* dealt only with guidance to the jury, misperceived the nature of Goins's separate claim that under *Godfrey v. Georgia*[23] the state is obligated to reveal its narrowing constructions of the vileness factor. Goins claimed that due process afforded him the right to notice of what the Commonwealth would allege at the penalty trial that "vileness" **meant** so that Goins would have a meaningful opportunity to defend himself against the state's case for death.[24] Proof of the merit of Goins's claim can be found in the court's opinion itself. **After** the trial court denied Goins any narrowing construction of "vileness" (and therefore any opportunity to defend against it), and after he was sentenced to death, Goins learned *post hoc* that in **his** case "vileness" meant: (a) aggravated battery for shooting Jones twice in the head, and (b) "depravity of mind" because the victim was an "innocent" and "defenseless" child, the slaying was "execution style," and because Goins's motive for killing Jones was the child's relationship to his sister Tamika.[25] As viscerally disgusting as Goins's crime might appear, the law requires more. Had he some inkling of what the appellate court would later consider the meaning of "vile" to be, Goins could certainly have contested at least some of its components. A defendant must not be sentenced to death "on the basis of information which he had no opportunity to deny or explain."[26]

Finally, the court held that "the record fails to show that the denial of Goins' request . . . impaired his ability to challenge the application of the capital murder and death penalty statutes, or to file suppression motions based on Fourth and Fifth Amendment grounds."[27] This incredible statement certainly puts the cart before the horse: the court is asking the defendant to demonstrate on the record that he was prejudiced by **not** receiving information, but, of course, not having received the information would prevent the defendant from putting it on the record. The purpose of requiring the state to give the defendant notice of the nature and character of the offense with which he is charged is to allow the defendant a fair opportunity to defend himself; the determination as to whether this opportunity has been denied should not rely upon the defendant's ability to make a nearly impossible showing of prejudice on the record. Despite the position of the Supreme Court of Virginia on the issue of the bill of particulars, defense counsel should continue, as in *Goins*, to both move for a bill of particulars at the trial level and preserve the issue for appellate review. It is possible (perhaps even likely) that someday the United States Supreme Court will rule that the position of the Supreme Court of Virginia does not comply with the due process requirements of notice and a meaningful opportunity to defend.

II. *Voir Dire*

Goins requested that certain questions related to interest, opinion or prejudice be asked the potential jurors.[28] The trial court refused certain of the questions.[29] These questions related directly to matters of great importance to the qualifications of capital jurors, for example, race, attitude towards the death penalty, and religion. Nonetheless, the court rejected Goins's claim on the grounds that limiting *voir dire* was within the sound discretion of the court. Note that counsel did not merely object to the rejection of his *voir dire* questions as an abuse of discretion, but

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[18] *See Simmons v. South Carolina*, 114 S. Ct. 2187 (1994) (holding that due process requires that a defendant be permitted to rebut future dangerousness aggravating factor with evidence of parole ineligibility if sentenced to life in prison); *Lankford v. Idaho*, 500 U.S. 110, 127 (1991) (stating that lack of notice that the death penalty may be imposed by a trial judge, even though prosecutor was not requesting the death penalty, created an "impermissible risk" that adversarial system would not function properly.); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (explaining that defendant was denied due process where trial court refused admission of defendant's good behavior in prison during the penalty phase of his trial); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (holding a capital defendant may not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." *Id.* at 362). *See also* Pohl and Turner, *If at First You Don't Succeed: The Real and Potential Impact of* Simmons v. South Carolina *in Virginia*, Capital Defense Digest, Vol. 7, No. 1, p. 28 (1994).

[19] Va. Code Ann. § 19.2-264.4(C).

[20] Va. Code Ann. § 18.2-31(7).

[21] *Goins*, 251 Va. at 454 n.1, 470 S.E.2d at 123 n.1.

[22] *Buchanan v. Commonwealth*, 238 Va. 389, 397, 384 S.E.2d 757, 762. The *Buchanan* court held that where four people were killed as part of one transaction, there could be only one capital murder conviction, but if two victims were killed as part of one transaction, and two as part of another, there could be two capital murder convictions. *Id.*

[23] 446 U.S. 420 (1980). Virginia's statutory definition of "vile" is identical to that found unconstitutionally vague in *Godfrey*; therefore, a narrowing construction of "vileness" is required.

[24] The United States Supreme Court has demanded that a higher degree of clarity be present in factors necessary for death eligibility, of which "vileness" is one under the law. *Tuilaepa v. California*, 114 S. Ct. 2630, 2635 (1994).

[25] *Goins*, 251 Va. at 468, 470 S.E.2d at 131.

[26] *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

[27] *Goins*, 251 Va at 455, 470 S.E.2d at 123.

[28] *Id.* at 458, 470 S.E.2d at 125.

[29] Many of the refused questions might be useful models for other defense counsel to consider in their own *voir dire*:

> Are you a member of any organization, religious denomination, or other group that has taken a position in support of the death penalty?

assigned error on Sixth, Eighth, and Fourteenth Amendment grounds as well.[30] Once again, counsel federalized an issue and preserved it for later appeal.

III. The Default Trap

In *Goins* the Supreme Court of Virginia continued the work of constructing new technical procedural default rules that it had left off in *Sheppard v. Commonwealth*.[31] In *Goins*, the Supreme Court of Virginia adds a new twist. The court held that two of Goins's assignments of error were defaulted on appeal because a different **argument** in support of an objection was made on appeal than was made at trial.[32] First, Goins had objected to the testimony of the detective who had found gun publications in the apartment of Goins's girlfriend. Counsel objected at trial that "[t]he police evidently did not seize any of those things . . . and it puts us at a terrible disadvantage in that we don't have the ability to cross-examine in reference to that."[33] On appeal, Goins argued that the detective's testimony was irrelevant and prejudicial. The Supreme Court of Virginia said this was a "new argument" and was therefore defaulted. Likewise, the court would "not consider the objection Goins raised at trial because he [had] abandoned it on appeal."[34]

The second default was even more bizarre because it dealt with a rule every trial lawyer, and certainly every trial judge, knows by heart—that evidence is inadmissible if not relevant, or, if relevant, if its probative value is outweighed by its prejudicial value.[35] In *Goins*, counsel objected to the presentation of a prosecution witness, Kenya Jones, on the grounds that it was irrelevant. On appeal, he added the additional argument that the prejudicial impact of the witness's testimony outweighed its probative value. The court found that the prejudicial impact claim was defaulted because of counsel's failure to articulate it when he made the irrelevancy objection.[36]

In so holding, the court purported to rely on Rule 5:25.[37] However, the Rule only states that objections have to be stated with "reasonable certainty" before the trial judge. Contemporaneous objection rules are intended to allow trial courts the opportunity to make correct rulings and thereby obviate the need for retrials. There is no implication in the language of the Rule that a variation on the initial objection will result in default, especially if the state is not prejudiced by the variation.

Claggett v. Commonwealth[38] and *Goins* appear to be the first application of this new procedural bar. Even so, there should be no bar to federal review of the merits of these claims. This is because the court's ruling appears to run afoul of the United States Supreme Court's holding in *Ford v. Georgia*.[39] In that case the Court struck down a state supreme court ruling that barred a claim based on a procedural rule not announced until well after the trial. The situation in *Goins* is analogous to that in *Ford*: Goins was barred from pressing a claim by a rule that was announced for the **first time** in **his** appeal. In *Goins*, the Supreme Court of Virginia is engaging in appellate "trial by ambush" because the defendant could have no notice of the rule that was to be retroactively applied against him.[40]

Now that Virginia trial courts are on notice of this new interpretation of Rule 5:25, defense counsel in future cases may advise the court that some delay in their trial will be attributable to the obligations arising from *Goins* and *Claggett*. It is obviously impossible in the heat of a contested jury trial to advance every conceivable argument to every objection. Particularly on "hornbook law" issues such as the relevance/prejudice rule, it is an insult to the intelligence of trial judges to hold that this delay is necessary. Nevertheless, after *Goins* and *Claggett*, conscientious defense counsel must do three things: 1) pause and attempt to advance every argument, 2) ask for recesses at critical points in the trial in order to review rulings made to that point, and 3) where appropriate, renew motions and objections, proffering new grounds.

Summary and analysis by:
Daryl L. Rice

> [H]ave you or a member of your family, or any close friend, ever had an opportunity to see the inside of a prison, jail, or other correctional facility?
> What are your impressions of the ability of psychologists or psychiatrists to understand the human mind?
> What are your views as to the major causes of crime in our society?
> Have you ever experienced fear of a person of another race? If so, what were the circumstances?
> Do you think that African-Americans are more likely to commit crimes than whites? If so, why?
> What is your opinion about the philosophy of "an eye for an eye" as it concerns the use of the death penalty as punishment for murder?
> What types of situations do you think the death penalty might be appropriate for? In such situations, do you think the death penalty should always be imposed?
> Do you think that imprisonment for life is a severe enough punishment for someone who has been convicted of any type of murder? Would the age of such a convicted person affect your thinking?
> Why do you think we are asking all these questions about the death penalty?

For a complete list of the proposed questions rejected by the court, see *Goins*, 251 Va. at 457 n.3, 470 S.E.2d at 124 n.3.

[30] *Id.* at 458, 470 S.E.2d at 125.

[31] 250 Va. 379, 464 S.E.2d 131 (1995). Per *Sheppard*, if a defendant assigns error only to specific errors upon which relief should be granted, but does not also make a general assignment of error, his specific claims will be defaulted. *See* case summary of *Sheppard*, Capital Defense Journal, Vol. 8, No. 2, p. 9 (1996).

[32] *Goins*, 251 Va. at 463, 470 S.E.2d at 128.

[33] *Id.*

[34] *Id.*

[35] *See* Friend, Charles, *The Law of Evidence in Virginia*, § 136 (3d ed. 1988); McCormick, *Evidence*, § 185 (3d ed. 1984). *See also Cumbee v. Commonwealth*, 219 Va. 1132, 254 S.E.2d 112 (1979).

[36] *Goins*, 251 Va. at 463, 470 S.E.2d at 129.

[37] Va. Sup. Ct. R. 5:25 states, "Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice."

[38] 252 Va. 79, 472 S.E.2d 263 (1996). *See also* case summary of *Clagget*, Capital Defense Journal, *this issue*.

[39] 498 U.S. 411 (1991).

[40] Goins's claim is even stronger on this point than the petitioner in *O'Dell v. Netherland*, 1996 WL 509991 (4th Cir. 1996). *See also* case summary of *O'Dell*, Capital Defense Journal, *this issue*.